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Issue Date: 03 November 2008

OALJ No.: **2009-TLC-00002**
ETA No.: **C-08267-14851**

In the Matter of

GRAND VIEW DAIRY FARM,
Employer

Certifying Officer: Robert E. Myers
Chicago National Processing Center

Appearances: Mary Jane Yorke, Esquire
Lake Park, Georgia
For the Employer

Stephen R. Jones, Esquire
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **JOHN M. VITTONE**
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations at 20 C.F.R. Part 655, Subpart B.[1] On October 17, 2008, Grand View Dairy Farm ("Employer") appealed the Certifying Officer's October 1, 2008, denial of its H-2A application for temporary alien labor certification. *See* § 655.112. A de novo hearing was conducted on October 22, 2008. *See* § 655.112(b). The hearing was via telephone and was recorded by a court reporter. The only witness to testify was the Certifying Officer ("CO").

[1] Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

The regulations relating to de novo hearings for H-2A determinations direct the administrative law judge to render a decision within ten working days after the hearing. § 655.112(b)(1)(iii). On the basis of the hearing record, the administrative law judge must "either affirm, reverse, or modify the OFLC Administrator's determination." § 655.112(b)(2). In this proceeding, the hearing record includes Employer's Exhibits 1-18, the 29-page Administrative File, and the hearing transcript.[2]

BACKGROUND

The Employer is a family-owned organic dairy farm in Washington County, Pennsylvania. AF 26; EX 17. On September 23, 2008, the Employer filed its H-2A application with the Department's Employment and Training Administration's Chicago National Processing Center. AF 13. In particular, the Employer sought temporary alien labor certification for four unnamed workers to cultivate crops for feed, erect fences, assist in dehorning and castrating calves, milk cows, shovel manure, and assist with sanitation tasks. *Id.* The Employer listed January 15, 2009, through December 12, 2009, as its dates of expected need. AF 14. The Employer's period of need is one month longer than it otherwise would be because it is an organic farm. EX 17.

On September 30, 2008, the CO informed the Employer that its application was "not being accepted for consideration" and requested that the Employer modify its application. AF 8-10. The CO explained that the work for which the Employer seeks alien laborers "appears to be a year-round activity, and neither temporary nor seasonal in nature." AF 10. Accordingly, the CO instructed the Employer to file "supporting evidence that a temporary need exists." *Id.* Specifically, the CO requested "summarized payroll reports" and attached an example. *Id.* The CO also wrote, "The H-2A program is not intended to allow agricultural employers who need additional labor permanently to rotate different alien laborers through its business for periods of less than one year." *Id.*

[2] Citations to the record of this proceeding will be abbreviated as follows: EX – Employer's Exhibit; AF – Administrative File; and TR – Hearing Transcript.

On October 7, 2008, the Employer submitted a summarized payroll report for all of 2007 and for January through September of 2008, predicted statistics for the balance of 2008, and a narrative explanation of the report's contents. AF 5-7. In short, the Employer explained that, because they cannot find temporary laborers for their busy season, the farm's owners—Mr. and Mrs. Stephen Magan—have each worked more than 40 hours per week and relied on contributions from friends who have refused compensation to accomplish the work of four temporary farmhands. AF 6-7. The Employer noted that performing this work has forced the Magans to neglect other aspects of the farm's operation. AF 7.

On October 8, 2008, the CO issued a letter denying the Employer's application. AF 3. In his letter, the CO again wrote that the work for which the Employer seeks alien laborers "appears to be a year-round activity, and neither temporary, nor seasonal in nature." *Id.* However, the CO also wrote that the Employer "submitted a summarized payroll report for calendar year 2007 and part of calendar year 2008 *showing that they have a need for temporary H-2A workers* for the period of January 15, 2009[,] through December 12, 2009." *Id.* (emphasis added). The CO observed that "[t]he report shows that temporary workers will not be needed only between December 13, 2008, and January 14, 2009." *Id.* Finally, the CO noted that Employer's "dates of need are greater than the allowable ten (10) months in duration." *Id.*

During the October 22, 2008, hearing, the CO explained further the basis for his decision. In particular, the CO testified that he issued the September 30, 2008, modification letter because the Employer's stated period of need was not of "a seasonal nature or temporary nature, in the eyes of the Chicago National Processing Center." TR 16. He described the Center's policy against certifying applications for periods exceeding ten months as "longstanding." TR 16-17, 25-26.[3] The CO also explained that, despite his October 8, 2008, description of Employer's payroll report as "showing that they have a need for temporary H-2A workers," denial letter, he did not find that the Employer demonstrated a temporary need for the program's purposes. TR 20-21. Finally, he noted that the denial letter contained a typographical error. TR 21. He

[3] On cross-examination, however, the CO stated that he could only attest to the period he had worked at the Center, which was two and one-half months. TR 26.

explained that the letter should have stated that the Employer would not need workers only between mid-December 2009 and mid-January 2010. TR 21, 32-33.

DISCUSSION

The only issue on appeal is whether the Employer established a temporary or seasonal need for H-2A workers, as required by 20 C.F.R. § 655.100(c)(2) and 656.101(a).[4]

Regulatory Framework

"The regulations define "of a temporary or seasonal nature" as follows:

> Labor is performed on a seasonal basis, where, ordinarily the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year
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> * * *
>
> A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.
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> * * *
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> "On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker

[4] The Employer argued at the hearing that the denial was based in part on a policy that bars dairy farms from participation in the H-2A program. Moreover, the Employer argued that such a policy may have been in response to a policy of the Commonwealth of Pennsylvania. EX 6. Indeed, the CO's denial letter states that the "care and feeding of livestock and the milking of cows are job duties performed on a year-round basis and are neither temporary, nor seasonal in nature." AF 3. At the hearing, however, counsel for the CO took the position that the fact that a dairy farm was involved in milking was not the determinative factor in the denial, but that the reason for the denial was solely the Employer's length of need, which was not seasonal or temporary. TR 10-11; TR 36-38. Moreover, the CO testified that "the milking of cows can and cannot be seasonal, depending on the fact and circumstances of a particular case." TR 30-31. Thus, I find that the CO is not basing the denial on the fact that the Employer is a dairy. *See also* TR 31, lines 8-21.

> is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

§655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20). The regulations go on to define "temporary" as

> . . . any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances pursuant to §655.106(c)(3) of this part.

§ 655.100(c)(2)(iii).

In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification. *See* 52 Fed. Reg. 16,770 (1987) (proposed rule, May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule, June 1, 1987); 52 Fed. Reg. 20, 507 (1987) (codified at 20 C.F.R. pt. 655). The rulemaking reveals that the Department's interpretation of the word "temporary" under the H-2 provision is intended to be consistent with the common meaning of the word "temporary," and to have the same meaning for both H-2A and H-2B purposes. 52 Fed. Reg. 20,497 (1987) (interim final rule June 1, 1987). In stating this, the Department accepted the administrative and judicial interpretation as set forth in the leading case *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *Artee* held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is "whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling." *Id*. Thus, the regulatory history of DOL's temporary labor certification rules provides that:

> [i]t is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment . . . of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is <u>whether the employer's need is truly temporary</u>.

52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987) (emphasis added).

The regulatory history does not closely examine the meaning of the word "seasonal." It is indicated, however, that the meaning ascribed to the word "temporary" "will not be a problem for much of agriculture, which uses workers on a seasonal basis." *Id.* at 20, 497. The regulatory history also indicates that: "Of course, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." *Id*. at 20,498.

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer's need to have the job duties performed is "temporary" -- of a set duration and not anticipated to be recurring in nature; or (2) that the employment is seasonal in nature – that is, employment which ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. *See* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20).

The "Ten Month" Rule

In *Kentucky Tennessee Growers Ass'n, Inc.*, 1998-TLC-1 (ALJ Dec. 16, 1997), an H-2A case I heard in 1997, the Regional Administrator (RA) had used a nine-month benchmark for requiring the employer in that case to modify its application to reduce the period of employment to nine months or less, or to provide evidence to substantiate that the employment was not intended to continue indefinitely, and would not continue on essentially a year-round basis. I found in that case that the RA's "nine month rule" was not arbitrary, insofar as the RA had permitted the employer an opportunity to rebut its findings. Thus, I found that the "nine month rule" was not actually a rule, but rather simply a red flag that invoked a requirement that an employer establish that its needs are truly temporary or seasonal.

In the instant case, the CO, who is relatively new on the job, invoked what he understood to be a "longstanding" "ten month rule" applied by the Chicago National Processing Center. TR

25-29.[5] Some of the CO's testimony at the hearing suggested that he applied the ten month period as an absolute rule and would only allow a ten month period for an H-2A application to be considered as presenting temporary work. TR 25-26, 29. Moreover, the denial letter of October 3, 2008 stated, in part, that the application was being denied because "the employer's dates of need are greater than the allowable ten (10) months in duration." AF 3. However, when the CO's testimony as a whole is reviewed, it is clear that the "ten month rule" is only applied as a threshold. TR 27. Moreover, the CO's modification letter of September 30, 2008 informed the Employer that it needed to substantiate in writing that its need for H-2A workers was temporary. AF 10.

I find that the "ten month rule" is not arbitrary if used in the manner stated in *Kentucky Tennessee Growers Ass'n*, to wit – as a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature. Despite the statement in the October 3, 2008 letter that the application was being denied because the dates of need exceeded ten months, I find that when viewed in the context of the entire proceeding, the Employer was clearly provided a full and fair opportunity to submit proof to establish the temporary nature of its employment needs.[6] Moreover, this case is proceeding under the de novo review procedure at § 655.112(b). Thus, even if the CO applied the ten month

[5] At the hearing, Counsel for the Employer attempted to impeach the CO's testimony that this was a "longstanding" rule of the Chicago National Processing Center. As evidenced by the Kentucky Tennessee case I heard in 1997, however, ETA officials were using a "nine month rule" many years ago. A ten month rule is obviously less restrictive. Regardless of the amount of time the "rule" may have been applied to H-2A applications, the longevity of the rule is not material to the issue presented in this appeal.

[6] At the hearing, the Employer requested a ruling that the CO's modification letter failed to provide adequate notice of the deficiency. TR 40-43. I have reviewed the September 30, 2008 modification letter, however, and find that it explicitly informed the Employer of the deficiency and the opportunity to present proof to rebut the finding. In *Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc), a Board of Alien Labor Certification Appeals ("BALCA") permanent labor certification decision, the Board noted that when an application is proposed to be denied, the CO is not required to provide a detailed guide to the employer on how to achieve labor certification. Rather, the burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. In *Cao*, the Board remanded the application because the CO's notice was ambiguous, and may have lead the employer to believe that the specific evidence requested in the notice was all that was needed to rebut and for labor certification to be granted. In the instant case, the modification letter directed the Employer to provide payroll records, but was not written in such a way as to suggest that provision of such records would lead a grant of certification. Thus, I decline to find that the modification letter gave deficient notice of the issue to be rebutted.

rule as a standard rather than merely a threshold, the Employer had an opportunity before the undersigned to establish that its need was temporary or seasonal under the regulatory standards.[7]

Whether the Employer Proved that Its Need Was Temporary or Seasonal

The Employer stated that its need for workers extends over eleven months of the year. AF 29.[8] Thus, the Employer's need for workers is substantially for the entire year. By implication, an ongoing dairy operation will have this same need each and every year. Thus, the need for workers, which under the *Artee* rule is the focus of the analysis, clearly is not temporary. Nor is there any evidence in this record that the work need is of a seasonal nature. Moreover, Counsel for the Employer stated at the hearing that, because of the need to erect fencing at the end of a year, a ten month application would not meet the Employer's needs. TR 38.[9]

The regulations require that the employment be for a period of less than twelve months. § 655.100(c)(2)(iii). This only means that an application that presents a period of employment longer than twelve months will not be certified under the H-2A program. It does not mean that employment that lasts less than a full twelve months is inherently temporary.

Accordingly, I find that the Employer's application does not present a need for agricultural labor or services of a temporary or seasonal nature, and therefore the CO properly denied certification.

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[7] *See generally Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), a BALCA decision under the permanent labor certification program, in which the Board held that if the CO's notice of deficiencies provided the employer with adequate notice of the violation and instructions for curing or rebutting the deficiencies, a less than fully reasoned Final Determination may not prevent the Board from affirming a denial of labor certification if the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded.

[8] The Employer wrote: "We need additional temporary farm hands from mid-January to mid-December, a period of eleven (11) months."

[9] Counsel suggested that the fact that the dairy was organic prevented it from hiring a fencing company to erect its fences. TR 38-39.

Whether the Employer Could Modify Its Application Before the ALJ

At the hearing, counsel for the Employer inquired whether, if my ruling was to be that the eleven month application is not temporary, the Employer could amend the application to reduce the tasks performed so that only ten months would be required, and thereby be granted certification. TR 40. Although this is a de novo hearing, I only have the authority to affirm, reverse or modify the CO's determination. § 655.112(b)(2). The authority to modify the CO's determination is not authority to permit the Employer to modify the application based on how the ALJ rules in the matter. Rather, if the Employer now wishes to modify its requirements in response to my affirmance of the CO's denial, the procedure is for the Employer to file a new application with the CO. *See* TR 44.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary labor certification is **AFFIRMED**.

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JOHN M. VITTONE
Chief Administrative Law Judge